

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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FIRST MERCURY INSURANCE COMPANY acting through  
its agent RIVERSTONE CLAIMS MANAGEMENT, LLC,

**Index No. 159185/2019**

Plaintiff,  
-against-

D'AMATO & LYNCH, LLP, LUKE LYNCH, Jr. Esq.,  
ARTURO BOUTIN, Esq., MICHAEL HAIG, DAVID  
BOYAR and ROBERT LANG, John Does 1-20,  
and Jane Does 1-10,

Defendants.

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**MEMORANDUM OF LAW**

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**PRELIMINARY STATEMENT**

This Memorandum of Law is submitted in support of a motion seeking the appointment of a temporary Receiver over the property of Defendant D'Amato & Lynch, LLP based upon the wrongful transfer of \$ 1 Million in trust funds received by Defendants from Plaintiff into the operating account of D'Amato & Lynch LLP rather than into an attorney escrow account.

Appointment of a temporary receiver is governed by CPLR 6401(a):

(a) Appointment of temporary receiver, joinder of moving party. Upon motion of a person having an apparent interest in property which is the subject of an action in the supreme or a county court, a temporary receiver of the property may be appointed, before or after if summons and at any time prior to judgment or during the pendency of an appeal, where there is danger that the property will be removed from the state, or lost, materially injured or destroyed.

This motion is accompanied by the Complaint, which was verified by Michael Bryant, Esq., an attorney associated with RiverStone Claims Management, LLC on the basis of personal knowledge of the facts and circumstances of the claim. (Exhibit A) His personal knowledge supports the claims. The property for which a temporary Receiver is requested are the cases in which D'Amato & Lynch, LLP represents various underlying parties, the D'Amato & Lynch LLP

accounts receivable, fees to be paid to D'Amato & Lynch LLP, ("D & L") funds in D & L bank accounts, Defendants' personal property and any real property held by D'Amato & Lynch, LLP, and is based upon the commingling, diversion, conversion or theft of \$ 1 Million in trust fund monies by D'Amato & Lynch, LLP, through the acts of its sole general partner, Luke Lynch, Jr, and his partners.

## **FACTS**

FIRST MERCURY INSURANCE COMPANY ("FMIC" "or "CARRIER") is a corporation, organized under the laws of the State of Delaware with a principle place of business in Morristown, NJ. RIVERSTONE CLAIMS MANAGEMENT, LLC ("Riverstone") is a limited liability company, organized under the laws of the State of Delaware with a principle place of business in Manchester, NH.

D'Amato & Lynch LLP is a law firm located in Manhattan. D & L was formed as a limited liability partnership. Luke Lynch, Jr. ("Lynch") is an individual, is an attorney, and is the sole general partner of D & L. Arturo Boutin ("Boutin") is an individual, and is an attorney who is or was a partner or a limited partner of D & L. David Boyar is an attorney who is or was a partner or a limited partner of D & L. Robert Lang is an attorney who is or was a partner or a limited partner of D & L. Michael Haig ("Haig") was at the relevant times a non-attorney comptroller of D & L.

Riverstone acts as manager of claims and agent for FMIC. Riverstone entered into an agreement dated August 14, 2017 ("Agreement") with D & L which appointed D & L as National Coordinating Counsel ("NCC") to represent FMIC's policyholders as their attorney in litigations, mostly of a personal injury nature, where the policyholders were defendants in the personal injury litigations.

D & L, over the course of time, became responsible for obtaining and disbursing settlement monies to Plaintiffs in underlying personal injury actions where it represented underlying policyholder defendants in those personal injury actions. In general, where a case between the underlying plaintiff and the policy holder defendant had been resolved, settlement monies would be provided to the settling underlying Plaintiff. Such settlement monies were on occasion transmitted to D & L for deposit in the trust account of D & L to be held pending disbursement to the settling Plaintiff, as differentiated from fee payments to D & L and as differentiated from D & L's operating account.

Management, control and accounting of the D & L trust accounts are all subject to the Rules of Professional Conduct of the State of New York, 22 NYCRR 1200 Rule 1.15. Comingling of trust monies entrusted to D & L with D & L's operating accounts is forbidden under Rule 1.15. The Agreement did not discuss or set forth terms concerning the transmission or handling of trust fund payments for use in settlement payments to underlying Plaintiff in the personal injury actions. There is a routine industry practice pursuant to which an insurance company would transmit money, in trust, to the attorneys for the insured, then to be held in trust, and then to be paid over to the settling Plaintiff at settlement.

One underlying personal injury matter handled by D & L on behalf of Plaintiff was *Cox v. Linco Restoration Corp., et al.* ("Cox matter"). Boutin, an attorney at D & L, handled the Cox matter along with others at D & L. He advised Plaintiff by email dated September 25, 2018 that the matter had been settled and that the amount to be paid by FMIC was \$ 1 Million.

On October 15, 2018 FMIC issued check # 0000239219 in the amount of \$1 Million to the order of "D'Amato & Lynch LLP Trust Account." (the "Check") (Exhibit B) D & L deposited the Check on October 17, 2018. Although the check was made payable to the D & L Trust Account,

nevertheless, D & L, then in financial difficulties, deposited the check into its own operating account. Shortly thereafter, D & L advised FMIC that it was no longer able to handle the FMIC files and set in motion a process to end the Agreement and transfer the files to subsequent counsel. Thereafter D & L advised Plaintiff that it had wrongfully deposited the trust monies into the D&L operating account. (Exhibit C) That deposit was a wrongful conversion of the \$1,000,000.00.

A demand letter was issued on August 1, 2019 to D & L demanding that the \$ 1 Million trust settlement funds be returned. (Exhibit D) Between the wrongful deposit of the \$1 million check to the D & L operating account and the demand letter D & L fraudulently conveyed the money, as the term is used in New York's Debtor-Creditor Law sections 270 *et seq.*, from the firm's operating account to other individuals or entities. It appears that Michael Haig, the firms' comptroller made the actual deposit. On August 1, 2019, during an investigation, Daniel Lynch, brother of general and managing partner Luke Lynch, Jr., admitted that the check had been deposited into the D&L operating account. (Exhibit C) Despite recognizing the error and despite the demand for return of the trust monies, D & L has refused, failed to and without cause not returned the \$1 Million trust money.

Luke Lynch, Jr. was the sole general partner, managing attorney, or the supervising attorney and the sole signatory of the trust account for D & L. Lynch acted on behalf of D & L as escrow holder of the trust funds advanced by Plaintiff, which were payable only to the underlying plaintiff

Boutin requested the funds from Plaintiff and was the attorney to whom the Check was sent.

Upon information and belief, Boutin handled the check, negotiated the Check and handled the funds along with Comptroller Haig

Defendants intentionally took possession of the Check # 0000239219 in the amount of \$1 Million to the order of "D'Amato & Lynch LLP Trust Account." Defendants exercised control over the Check and the funds which were represented by the check. Defendants took possession of a negotiable instrument, to wit: Check # 0000239219 in the amount of \$1 Million to the order of "D'Amato & Lynch LLP Trust Account" and refused to return the Check upon demand.

Defendants refused to return or repay the funds from the Check when a demand was made for the return of the Check or a return payment.

Once the \$1 million was placed in the D & L operating account the cause of action accrued, and the firm became a debtor under the law, while FMIC became the creditor. Accordingly, Plaintiff is a creditor which could pursue relief under Debtor and Creditor Law § 273. Defendants' violation of Debtor and Creditor Law renders the later transfers void.

## **ARGUMENT**

### **POINT I**

#### **DEFENDANT D'AMATO & LYNCH LLP's CONVERSION, COMINGLING OR THEFT OF \$ 1 MILLION WARRANTS APPOINTMENT OF A TEMPORARY RECEIVER PURSUANT TO CPLR 6401(a)**

Appointment of a temporary receiver is proper when there is danger that the property will be removed from the state, or lost, materially injured or destroyed.

The assets of D'Amato & Lynch LLP are in danger of waste, material injury, dissipation or disappearance. D'Amato & Lynch, LLP has been the subject of newspaper reports that they have lost the bulk of their attorney roster. (Exhibit E) D'Amato & Lynch, LLP is in litigation with its landlord over non-payment of rents and expenses. (Exhibit F) D'Amato & Lynch, LLP has notified Plaintiff that it can no longer handle personal injury litigation defense for Plaintiff's

policyholders. One reason for this inability to continue representing the policyholders is the lack of attorneys to handle the caseload. (Exhibit E)

D'Amato & Lynch's comingling of \$1 Million trust funds, 22 NYCRR 1200 Rule 1.15 with the company operating account (in the face of litigation faulting its rent payments) and in the face of the attorney employee or limited partner abandonment of D'Amato & Lynch demonstrates that it is not profitable, cannot pay its bills, is in imminent danger of insolvency, has engaged in financial diversion of trust funds, is the subject of a Departmental Disciplinary complaint for comingling, diversion of trust funds, refusal to refund the comingled, converted or stolen funds pose an immediate danger to D'Amato & Lynch's well-being as well as indicating that the funds are in imminent danger of being lost and converted. D& L's intentional wrongful conversion suggests that immediate action is needed to preserve its assets. The assets of D'Amato & Lynch LLP are in danger of waste, material injury, dissipation or disappearance.

Comingling of funds is a proper basis for the appointment of a temporary Receiver. *Friedman v. Ragin*, 228 A.D.2d 642, 643 (2d Dept, 1996).

"The plaintiff made a clear evidentiary showing of the necessity for the conservation of the property at issue and the need to protect her interests (see, *Modern Collection Assocs. v Capital Group*, 140 AD2d 594; *Schachner v Sikowitz*, 94 AD2d 709; *Glassner v Kaufman*, 19 AD2d 885). The plaintiff established, and the appellant did not dispute, the commingling of patients' funds with the nursing home's operating costs. The appellant's affidavits, in which he claimed, on information and belief, that the commingling was justified [\*\*\*4] under the circumstances, were insufficient to rebut the plaintiff's showing. Similarly, the appellant claimed, on information and belief, that the large amounts of money disbursed to him by Ralex constituted the repayment of a loan, but he submitted no evidence as to Ralex's approval or receipt of the alleged loan. Moreover, upon an examination of the record, we are satisfied that the grant of a preliminary injunction was amply supported by the undisputed facts (see, *County of Orange v Lockey*, 111 AD2d 896, 897)."

Plaintiff has made "a clear evidentiary showing of the necessity for the conservation of *Glassner*, supra; *Shapiro v. Ostrow*, 46 A.D.2d 859 (1<sup>st</sup> Dept, 1974) Comingling creates a

situation “ripe for dilution of the income assets and harm to the interests of the nonparticipatory” plaintiff. *Gimbel v. Reibman*, 78 A.D.2d 897,898 (2d Dept. 1980). In cases of “misappropriation of funds” such as the instant matter, appointment of a temporary Receiver is warranted. *Jones v. Cuffee*, 49 A.D.2d 883, 883 (2d Dept. 1975); *LeFebvre v. Shea*, 212 A.D.2d 884, 885 (3d Dept, 1995)

Comingling of funds between accounts is sufficient for the appointment of a temporary Receiver in commercial settings. *Somerville House Management, Ltd. v. American Television Syndication Co.*, 100 A.D.2d 821, 822 (1<sup>st</sup> Dept, 1984)

Plaintiff has met each element necessary for the appointment of a Temporary Receiver over the property, real and personal, of D’Amato & Lynch, LLP, and Luke Lynch, Jr., the primary wrongdoers to which the funds went.

### **CONCLUSION**

Plaintiff has demonstrated that appointment of a temporary Receiver is warranted when defendants have commingled attorney trust funds with their own operating account and in doing so have dissipated the funds, or when the funds are misappropriated that there is danger that the property will be removed from the state, lost or materially injured or destroyed.

WHEREFORE, it is respectfully requested that this Court appoint a Temporary Receiver over the property, real and personal, accounts receivable, bank accounts as well as the operating accounts of D’Amato & Lynch, LLP and Luke Lynch Jr. and for such other, different and

further relief as to this Court may seem just and proper.

Dated: New York, New York  
November 11, 2019



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Andrew Lavoott Bluestone